

1 BEFORE THE
2 FEDERAL ELECTION COMMISSION

3 _____
4 In Re: MUR 5517

5 Jim Stork for Congress,
6 et al.
7 _____

8
9 Probable Cause Hearing

10
11 United States
12 Federal Election Commission
13 999 E Street, Northwest
14 Washington, D.C.

15
16 10:05 a.m.

17 Tuesday, July 17, 2007
18

19 MEMBERS OF THE PANEL:

20 ROBERT D. LENHARD, CHAIRMAN

21 DAVID M. MASON, VICE CHAIRMAN

22 ELLEN L. WEINTRAUB, COMMISSIONER

23 STEVEN T. WALTHER, COMMISSIONER

24 HANS A. von SPAKOVSKY, COMMISSIONER
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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHAIRMAN LENHARD: Good morning. I
4 would like to call to order the Probable Cause
5 hearing in MUR 5517 involving Stork for Congress.
6 The FEC's Office of General Counsel has
7 recommended the Commission to find probably cause
8 to believe that Stork Bakery has made and the
9 Stork Campaign received prohibited contributions
10 in the form of coordinated communications.

11 The communications in question were made
12 through cable television and direct mail and
13 featured Mr. Stork who was then running for
14 Congress. The communications were distributed in
15 June and July of 2004. Florida held its Primary
16 Election August 31st of that year.

17 Stork for Congress has requested this
18 hearing to argue the Commission should not follow
19 the General Counsel's Office recommendations at
20 least not in its entirety. Under our pilot
21 program, at least two Commissioners have voted to
22 grant a hearing in this matter.

23 Mr. Brad Litchfield and Mr. Bill Oldaker
24 are here to argue on behalf of the Respondents in
25 this matter. And for the record, they have also

1 brought with them to the hearing two lawyers from
2 their firm Bill Farah and Phu Huynh as well as
3 legal intern Mike Pratt. Welcome to you all.

4 Mr. Litchfield and Mr. Oldaker, you have
5 20 minutes for your presentation. You may divide
6 your time as you wish between an opening and
7 closing statement. And I believe that you have
8 done so. And my recollection from my conversation
9 with the Staff is that you reserved 14 minutes of
10 time for the opening and 6 minutes for the
11 closing.

12 MR. OLDAKER: Correct. We didn't want
13 to make it easy.

14 CHAIRMAN LENHARD: They've -- my Staff
15 has worked out the lights in front of you to blink
16 at the appropriate colors at the appropriate
17 times.

18 And I also understand you have an
19 advertisement you would like to show us during
20 that opening presentation.

21 MR. OLDAKER: Yes.

22 CHAIRMAN LENHARD: After your opening
23 statements, the Commissioners will have an
24 opportunity to ask you questions as will the
25 general counsel and the Staff Director or her

1 representative today who is John Gibson.

2 The Commissioners who have questions
3 will seek recognition from the Chair. We will not
4 be using the lights or timers or any particular
5 order. The same holds true for General Counsel
6 and the representative from the Staff Director's
7 Office.

8 We are scheduled to proceed for an hour
9 and a half. So we will be wrapping this up around
10 11:40 unless we run out of questions or you run
11 out of answers prior to that.

12 With all of that said, Mr. Litchfield,
13 Mr. Oldaker, please proceed. We're ready.

14 MR. LITCHFIELD: Thank you,
15 Mr. Chairman. Good morning. We are pleased to be
16 here.

17 We want to commend the Commission for
18 instituting the pilot program. And we're glad to
19 participate in it. We understand that our case
20 may be the second hearing that you've had in the
21 program. We hope it goes well. We would like to
22 see it become permanent.

23 We hope our contribution and our part of
24 the program, whatever the outcome, produces a
25 record for you that you can say that the program

1 is worth it; that you ought to continue it.

2 We want to reserve, as the Chairman
3 indicated, 6 minutes of our 20 minutes for the
4 close and use 14 minutes at this point. And we're
5 going to share the time in sort of a tag team
6 approach.

7 So I'm pleased to accompany Bill Oldaker
8 who 30 years ago today would have been about
9 6 months into his tenure of 3 years as the
10 Commission's second General Counsel. So he
11 doesn't -- I don't know if he likes to be reminded
12 about that or not.

13 MR. OLDAKER: Thank you. It's good to
14 be back after all these years. Actually, when I
15 was with the Commission, we had much less decorous
16 surroundings. We were over on K Street, 1300 K
17 Street.

18 Let me start with I believe that, when
19 you look at this case clearly and you look past
20 the kind of trees that chafe, we'll see that, at
21 the basic premises of the ad, that this cannot be
22 a violation of the Act.

23 Recently, you've had a little
24 illumination on the term electioneering
25 communication by the Supreme Court.

1 We're dealing with coordinated
2 communications in this case, which basically the
3 Commission tried to create a regulation I think to
4 draw a bright line in this area to protect First
5 Amendment rights and to try and determine a
6 specific period of time and specific act so that a
7 lot of discovery would not have to be done and you
8 could tell whether or not they were, in fact,
9 coordinated communications.

10 And then outside of that framework, that
11 time frame, you basically defined a few things,
12 republication, express advocacy, which would, in
13 fact, also be coordinated communications. And I
14 think that's very helpful. I think that's a very
15 positive as far as your role in protecting speech
16 rights.

17 Here of course we're always, even with
18 your regulations, we're always controlled by the
19 underlying premise as to the jurisdiction for
20 regulating speech.

21 And that is in this case, and with all
22 cases, part of this premise is for the purpose of
23 influencing election set out both in the
24 definitional section in contributions and in
25 expenditures. That is the breadth of regulatory

1 authority. It's only when an expenditure of funds
2 is made for the purposes of influencing an
3 election.

4 And at its very heart, you have to have
5 a few things to influence an election. One thing
6 that is very necessary is you need ears. You need
7 voters. You cannot influence an election if there
8 are no voters. And that is the case here.

9 And let me run through, you know, the
10 various issues in this case. First, Jim Stork,
11 who is a small businessman, a baker, became a
12 candidate the way that most people do by filing
13 his petition by May 7th, 2004.

14 Also, Congressman Clay Shaw did the same
15 thing. No other persons filed a petition to
16 become a candidate in Florida. Therefore, there
17 were only two candidates who were to be certified.
18 No one filed to be a write-in candidate. Under
19 Florida law, you must file to be a write-in
20 candidate by, in this case, May 7th, 2004. No one
21 filed to be a write-in candidate.

22 So Jim Stork was the only democratic
23 candidate. Congressman Clay Shaw was the only
24 Republican candidate. There were no third-party
25 candidates. There were no write-in candidates.

1 The primary was held on August 31st. On
2 that date, on the ballot, there appeared no line
3 for the 22nd Congressional District. It did not
4 exist. And the reason it did not exist is it's
5 presumed under Florida law that no one was
6 qualified to challenge the two people who had been
7 certified by their parties.

8 So there was no possibility that anyone
9 who went into the voting booth could have voted
10 for anyone for Congress on August 31st. It was a
11 nullity. When the votes were counted, zero votes
12 were attributed to anyone from the 22nd
13 Congressional District in Florida.

14 So there was not, in my mind, a person
15 to influence for that election. It was impossible
16 to influence anyone since no one voted. No one
17 had the opportunity to vote.

18 So that is the basic factual premise in
19 the light that we look at this case. We have
20 other arguments that I'll make later as to
21 commercial speech.

22 There's no doubt none of the facts as
23 far as the ads are -- do we contest. We agree
24 with the General Counsel's Office when the ads --
25 the television ads ran, the cable division ads

1 ran. We also agree with the General Counsel's
2 Office as to when the flyers went out to various
3 people. Both within 90 days of the date of the
4 Primary Election which we would assert no election
5 was held. No voters voted.

6 So we are then at a point of trying to
7 deal with the underlying issues of the regulations
8 and applying those regulations.

9 So my one last issue, again, is to come
10 back and say that for the purposes of influencing
11 requires some voters. In your regs at one time,
12 you had words to that effect. You took those
13 words out of the current regs. But in your
14 explanation and justification, you indicated that
15 they were still important issues.

16 But let me turn it over to
17 Mr. Litchfield who has spent a number of years
18 with regulations. And whenever I had a question
19 when I was here and then for the 25 years
20 subsequent to that, that I had a question I didn't
21 know how to deal with, I called Brad Litchfield.
22 I still do that. Brad.

23 MR. LITCHFIELD: Thank you. It's been
24 said that a picture is worth a thousand words.
25 And one Commissioner suggested to me, well, then,

1 maybe all you need is a picture. I'm not sure
2 about that. But we would like to show you the ad
3 that we're talking about and run that now. It's
4 real quick.

5 And then when we run the video, we have
6 a handout that the General Counsel's Staff has
7 been kind enough will give to you. So please look
8 at the video. And then I want to show you one
9 piece in the direct mail package.

10 (Whereupon, the video ad was played and
11 transcribed as follows:)

12 Mom wouldn't make it this way. Neither
13 do we. We make fresh pies every day. Like
14 storkberry, pumpkin or apple crumb. Made with
15 love just like mom.

16 I'm Jim Stork. Come find out why
17 Stork's Cafe and Bakery means quality you can
18 trust.

19 Some people call it --

20 MR. LITCHFIELD: Second ad.

21 (Whereupon, the video ad continued and
22 was transcribed as follows:)

23 Others are just glad you can get it over
24 the counter. We believe it has to be made with
25 the finest beans served fresh and hot.

1 I'm Jim Stork. Come find out why
2 Stork's Cafe & Bakery means quality you can trust.

3 (Whereupon, the hearing continued as
4 follows:)

5 MR. LITCHFIELD: Thank you. And the
6 direct mail package had four different pieces.
7 And there's one piece we would like to put in
8 front of you as we talk about this so you can see.
9 All of these are on the record. And the General
10 Counsel's Office was kind enough to pass them
11 around. It's a two -- there's two pages there.
12 And it was front and back.

13 As I say, there were four of these. And
14 you can see there when you get them that they're
15 of a piece with what you saw in the videos.

16 We want -- for a couple of minutes, we
17 want to talk about content and the -- and the way
18 the Commission regulations approach content
19 issues.

20 Notice the ad: Stork's Cafe Bakery.
21 Locations. Quality you can trust. Come find out
22 why Stork's Cafe & Bakery means quality you can
23 trust. A list of products. Some address
24 information. A free lunch drawing. A free cookie
25 or pastry on -- this was a two sided thing.

1 The second page is the coupon to
2 participate in the drawing for the free lunch and
3 to announce the opening of the Stork Las Olas --
4 Las Olas location. It's in Fort Lauderdale.

5 The Commission regulations address these
6 kinds of communications using what's referred to
7 as a bright-line test. And a bright-line test is
8 intended to give easy application to determine
9 whether a communication is for the purpose of
10 influencing an election.

11 But I think it's recognized in the
12 Commission regulations and their background, the
13 explanation and justification indicate that this
14 test can only apply when you're in a zone of
15 political advocacy or in a zone of
16 election-related or campaign-related advocacy.

17 Those are some of the watch words that
18 have been used in Commission materials including
19 briefs in Court cases to describe in sort of
20 general terms the arena, the field of play in
21 which we look at communications that are --
22 purport to be campaign communications.

23 So I would submit to you that the
24 communication has to have a threshold look to
25 determine if it's in this zone, if it's on the

1 playing field, if it's between the right field
2 foul line and the left field foul line. If it's
3 outside the foul lines, it ain't in play; and you
4 can't really look at it in terms of purpose of
5 influencing.

6 In this respect, a bright-line test
7 needs to be prudently and with discrimination
8 applied to a particular communication. It can't
9 be universally applied and applied willy-nilly
10 without regard to what general generic type of
11 communication we're talking about.

12 The Commission regulations and their
13 explanation are pretty explicit and are
14 controlling in this respect. For example, in the
15 2002 regulation background, there is the statement
16 to the effect that the content standard and the
17 bright-line test are intended to limit the new
18 rules to communication whose subject matter is
19 reasonably related to an election.

20 Similarly, the bright line tests are
21 intended to subject to regulation only those
22 communications whose contents in combination with
23 the manner of creation and distribution indicate
24 that the communication is made for the purpose of
25 influencing.

1 The facts in this case indicate that
2 Mr. Stork's advertising campaign was to promote
3 the opening of his new business, to drive
4 consumers of bakery and cafe products to that new
5 business location, to get their business, not to
6 say anything about himself or about any issue in
7 any campaign that he may be undertaking in the
8 future.

9 These points are reaffirmed, really, in
10 the 2006 regulation development where the
11 Commission did delete the phrase "directed to
12 voters in the jurisdiction". But in doing so,
13 explained that the -- it was retaining a
14 bright-line test. The court decisions in Shays
15 affirming that the Commission could approach this
16 issue with a bright-line test.

17 The Commission said in the 2006
18 regulation process that it was -- the bright-line
19 test provided the clearest guidance to candidates.
20 And then it went on to say, under the new revised
21 regulation, time period -- one time period for a
22 House candidate begins 90 days before any Primary
23 in which the Congressional candidate is on the
24 ballot. Ninety days before the candidate is on
25 the ballot.

1 As we've already said, there was no
2 ballot here with Mr. Stork's name on it. There
3 was no ballot with his opponent's name on it in
4 this August 31, 2004 event.

5 Referring to the 2002 rules, this -- the
6 same explanation and justification also says that
7 the 2002 rules provided that, to satisfy the
8 fourth content standard -- that's directed to
9 voters -- a public communication must be directed
10 to voters in the jurisdiction where the clearly
11 identified candidate is on the ballot. Directed
12 to voters in a jurisdiction where the clearly
13 identified candidate is on the ballot.

14 And then, finally, the explanation and
15 justification indicates that these revisions,
16 referring to the 2006 revisions as compared to the
17 2002 version, clarify that a communication is
18 potentially for the purpose of influencing a
19 federal election where the persons receiving the
20 communication that is coordinated can vote for or
21 against the referenced candidate or candidate's
22 opponent in that election.

23 In this case, no ballot, no votes, no
24 voters, no violation.

25 MR. OLDAKER: Mr. Chairman, I would ask

1 if we could use another 2 minutes of our reserved
2 time for Mr. Litchfield to finish.

3 CHAIRMAN LENHARD: Certainly. You can
4 adjust that.

5 MR. LITCHFIELD: Your turn.

6 MR. OLDAKER: All right. Let me use the
7 2 minutes. I have two very quick points.

8 One is, in the Obershein case, which was
9 a conciliation agreement, Commission
10 von Spakovsky -- and I'm sorry I mispronounced
11 your name, I'm sure -- entered a dissent in that
12 where he recognized that the issue in that case
13 was commercial speech.

14 We feel that commercial speech is a very
15 important thing that the Commission has not paid
16 attention to.

17 In our democracy, many people who own
18 small businesses run for office. They have little
19 choice but to maintain both lives at the same
20 time. Certainly they can't use their business to
21 try and affect elections. But on the other hand,
22 you cannot ask them to remove themselves entirely
23 from the world of economics and moving forward.

24 And so I would ask that the Commission
25 look closely at that. I think Commissioner

1 von Spakovsky was correct in his decision or in
2 his dissent, excuse me.

3 Last point I would make, and it's a very
4 short point, and I don't really think Wisconsin
5 Right to Life is applicable on all fours to this
6 matter. But I do think it shows a method of
7 analysis.

8 I think Justice Roberts' method of
9 analysis, A, was correct. I think it was very
10 carefully taken. I think that he tried to find a
11 middle ground.

12 And I think, in doing that, I think it's
13 instructive as to how courts are going to look in
14 the future at issues where ads are in play,
15 whether they're in the narrow issue of express
16 advocacy or in the broader area where regulation
17 can occur in coordinated expenditures.

18 But I think that the ad itself is one
19 that is going to have to be examined on its face
20 to make a determination as to whether or not it is
21 violative.

22 Thank you.

23 CHAIRMAN LENHARD: Thank you very much.
24 Questions? Vice Chairman Mason.

25 VICE CHAIRMAN MASON: Can you tell me

1 whether, either before the time period we're
2 concerned with or since, has Stork's Bakery used
3 cable television advertising.

4 MR. OLDAKER: I'm very hard of hearing.

5 VICE CHAIRMAN MASON: Sorry. Either
6 before this time period or since, did the bakery
7 use cable television advertising?

8 MR. OLDAKER: Yes. When it opened its
9 original bakery, it used cable television. And
10 Mr. Stork believed that that was the method of
11 getting to customers when he opened a new bakery.
12 And this essentially was the second bakery that he
13 opened. He had a little tiny shop someplace, but
14 it wasn't only a bakery.

15 VICE CHAIRMAN MASON: And the second
16 bakery was opened when?

17 MR. LITCHFIELD: That's the Las Olas
18 location in June of 2004 which is when this ad
19 campaign was organized around.

20 MR. OLDAKER: And it was organized in --

21 MR. LITCHFIELD: It was organized in
22 April. The opening was delayed for construction
23 reasons. And it didn't occur until June. And
24 that was the timing of the cable television
25 advertising, right within a week or so of when it

1 opened.

2 CHAIRMAN LENHARD: I'm going to follow
3 with that if I can just a little bit because
4 the -- you present, as I see it, sort of two
5 arguments. One simpler than the other.

6 The simpler argument is simply he wasn't
7 on the ballot and, as a consequence, you know,
8 there were not voters; and, therefore, the
9 regulation shouldn't apply in that context.
10 That's fairly straightforward.

11 The second is a harder argument to my
12 eye, which is that, given the bright-line rule
13 we've established, there should be an exception
14 carved out for ads which we perceive of as
15 commercial ads. And the hard part of that is that
16 it moves from being a bright and clear line to
17 follow one which is parsed through in case-by-case
18 enforcement.

19 And so my question is going to sort of
20 pursue that second line of argument. And
21 following the Vice Chairman's questions, my -- I
22 actually went to the Web site of Mr. Stork's
23 bakery because I, too, was puzzled that a bakery
24 opening -- there are only two stores. They're
25 opening a second store. They buy TV, which is a

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1 reasonably expensive way to do this.

2 But the -- for those who don't know, the
3 two stores are dramatically different, right? One
4 is a reasonably small shop that looks like what we
5 used to call the White Castle kind of shops in the
6 District.

7 The other is an attempt, as I understand
8 it, to replicate a building on the Grand Canal in
9 Venice where there is actually a building that
10 looks very similar to a building in Venice. And
11 there's a canal there. And there's gondolas.
12 They have gondolas at the store.

13 The first question I had is --

14 MR. OLDAKER: Your knowledge is greater
15 than mine.

16 CHAIRMAN LENHARD: The Internet is an
17 amazing thing. But it gets into the problem now
18 we're doing this research. Right? We're trying
19 to figure out what's really going on here. We're
20 no longer just looking at the ad.

21 We're looking at the context and whether
22 this makes any sense or not; that he would
23 actually be doing this for commercial purposes as
24 opposed to as a way to get his name out there more
25 broadly.

1 And so the first thing I wanted to
2 ascertain was that the store that was being opened
3 in this case was the -- was the Las Olas one,
4 which I believe is the one that looks like the one
5 in the Grand Canal in Venice; is that right?

6 MR. OLDAKER: Correct. This is his big
7 issue, his big baby, whatever you want to call it.
8 As a businessman, this was very important to his
9 economic future.

10 CHAIRMAN LENHARD: Okay. And a
11 dramatic -- just by looking at the Web site, it
12 looks like a dramatic increase in floor space and
13 the grandeur of the setting, although I'm sure
14 it's entirely appropriate for the market.

15 MR. OLDAKER: Right.

16 CHAIRMAN LENHARD: If we move away
17 from -- and, you know, as I understand it, what
18 we -- the way we've been approaching these cases
19 is there's a bright line that candidates are not
20 allowed to involve themselves in these ads. They
21 can continue to run their businesses. They can't
22 run the advertisement that features them. That's
23 what he's done. And there's an argument that this
24 is a way to improve business is to feature the
25 owner, I guess.

1 The problem I have is that, as we go
2 down that path, how do we draw the lines, right?
3 Does our analysis in this change to the degree, if
4 the slogan "Quality you can Trust" is changed to a
5 name you can trust, Stork's Bakery, a name you can
6 trust, and the candidate he's running against is
7 embroidered in an ethics scandal, does -- do we
8 then begin to think, well, what is the message
9 really being delivered here?

10 You know, if he's on the ballot, are we
11 then -- do we begin to wander down a path where
12 we're discerning -- trying to discern what really
13 is the -- being communicated and whether it's
14 being communicated to customers?

15 MR. OLDAKER: I think you're exactly
16 right. It takes an analysis of what is in the ad.
17 And I think that if the ad -- and you're right, if
18 it was an ethics case -- there wasn't -- I guess,
19 maybe take that in.

20 But "quality" is a word that most every
21 promoter, seller, business person talks about.
22 You know, quality. It's not in other cases where
23 someone was talking about so and so knows
24 something about health care or so and so, you
25 know, whatever the issue du jour is in the

1 campaign.

2 It is, you know, a modifier to
3 something -- you know, "trust" is also a word, I
4 guess, which people could say, if you use the
5 name -- word "trust" with -- in relation to
6 someone, that may be reflective as to the person
7 and not the product, right?

8 But I think that, you know, within --
9 you know, I think that there's a very limited
10 bound where a candidate could act as their own
11 business person and appear in an ad and not talk
12 about anything that had anything to do with the
13 campaign and not make any pitch other than the
14 pitch of their product.

15 And to not allow them to do that seems
16 to be putting pressure -- and I realize -- you
17 don't have to get here if you don't want to. But
18 I think it's an important issue to consider.

19 It puts pressure on small business
20 people which, quite honestly, are the people who
21 all of us, both parties, republicans and
22 democrats, look to as possible candidates. They
23 are the people who are willing -- are risk takers
24 to begin with and will go take other risks.

25 You know, it's very hard to get someone

1 who is in the middle level of a corporation to
2 give up that corporation ladder or someone who's a
3 mid level of a law firm to go become a candidate.
4 That's just a practical thing in politics.

5 So all I'm saying is it is a difficult
6 issue. I realize it doesn't give you as bright a
7 line. And I know you're trying to create a bright
8 line.

9 CHAIRMAN LENHARD: Commissioner
10 von Spakovsky.

11 COMMISSIONER von SPAKOVSKY: Mr. Oldaker,
12 is the answer to that that a commercial ad would
13 be okay unless it's susceptible to no reasonable
14 interpretation other than as an appeal for or
15 against a specific candidate?

16 MR. OLDAKER: That's what I was
17 suggesting. And that's why -- that's why I say
18 it's not on all fours in that case. But I think
19 that's where the Chief Justice would go if
20 presented with that issue.

21 COMMISSIONER von SPAROVSKY: Well, I
22 mean, I ask that semi-jokingly, but it seems like
23 that is the kind of line that we're forced to draw
24 because it -- you know, in this case, our Office
25 of General Counsel is following a regulation and

1 saying, well, this was within 120 days, and it
2 fits within our content standard because it refers
3 to a clearly identified candidate for federal
4 office.

5 But the Supreme Court just basically
6 said that simply having a clearly identified
7 candidate for federal office in an ad is
8 constitutional as applied if the ad has nothing to
9 do with an election.

10 So doesn't that case -- even though that
11 case was about a different provision, does it not
12 call into question our particular regulation and
13 applying it in that same manner.

14 MR. OLDAKER: I believe it does. I
15 believe the analysis in that case is very
16 important for the analysis of this bright line.

17 This bright line, as I understand it,
18 and Bradley follows it much closer than I do, but
19 the bright line that was in the Wisconsin Right to
20 Life case was a bright line that Congress
21 basically constructed. You, then, constructed
22 another bright line for a different area of
23 coordinated communication. And both having the
24 same objective, to try and tell the public exactly
25 what the meets and bounds in a time frame were and

1 what it was.

2 So I think the analysis could be very
3 much the same. I believe it would be. We, of
4 course, won't know until it's done. But I agree
5 with you, Commissioner.

6 CHAIRMAN LENHARD: Commissioner
7 Weintraub.

8 COMMISSIONER WEINTRAUB: Did Mr. Stork
9 run other ads during other time periods that
10 featured his name and -- I mean, not -- aside from
11 Stork's Bakery, you know, the name on the -- over
12 the door, but featured jim Stork with a photograph
13 of him?

14 MR. OLDAKER: As a candidate or as a
15 baker?

16 COMMISSIONER WEINTRAUB: No, no. For
17 his bakery. For his bakery.

18 MR. OLDAKER: Only in the original
19 bakery, I believe.

20 MR. LITCHFIELD: There were some ads
21 that are on the record in the MUR that were run
22 mentioning the name of the business and -- like
23 around Halloween I remember, and a magazine ad
24 that he ran over a sustained period, a monthly
25 magazine that mentioned the business.

1 COMMISSIONER WEINTRAUB: And it had his
2 photo?

3 MR. LITCHFIELD: I don't think they had
4 his photo.

5 COMMISSIONER WEINTRAUB: Was there any
6 other time which he ran ads that included his
7 photo for his bakery?

8 MR. LITCHFIELD: Any other time period,
9 any other --

10 COMMISSIONER WEINTRAUB: Any time period
11 other than the one we're talking about --

12 MR. LITCHFIELD: Where he ran ads.

13 COMMISSIONER WEINTRAUB: -- where he ran
14 ads -- what I'm trying to get at is, is this his
15 pattern of advertising his business to use his
16 photograph and his name prominent in the
17 advertising; or was this something new and
18 different from him that, just oddly, around the
19 time he was running for Congress, he decided the
20 way to advertise his business was to put a great
21 big picture of his smiling face in the ad for his
22 bakery. That's what I'm trying to get at.

23 MR. LITCHFIELD: I don't believe there
24 were other ads outside this time frame that used
25 his picture. His picture was used in these ads

1 because of the opening of the bakery and to get --
2 it was a unique circumstance in his business life,
3 and he wanted to identify himself with the opening
4 of his new business. That's why he used the
5 photographs here.

6 COMMISSIONER WEINTRAUB: But he ran ads
7 when he opened his original business that didn't
8 use his photograph.

9 MR. LITCHFIELD: In 1998, the first one,
10 we understand that his -- he did not appear in ads
11 back in '98 when he opened the first business.
12 But his name was mentioned in the ads.

13 COMMISSIONER WEINTRAUB: Other than
14 Stork's Bakery, it said Jim Stork somewhere in
15 there.

16 MR. LITCHFIELD: I believe his name was
17 used, yeah. I'm not sure about his photos in
18 those early ads in '98.

19 MR. OLDAKER: Was his name Jim Stork
20 mentioned?

21 MR. LITCHFIELD: I think his name was
22 mentioned, but I don't know that they had photos.
23 We could look into that further and let you know.

24 But we -- our information at this point
25 is that, in those ads for the first bakery, that

1 he did not appear like he did on these cable ads,
2 but that his name was used, and maybe his photo
3 was used. I'm not sure.

4 COMMISSIONER WEINTRAUB: By the way, the
5 pies really did look delicious.

6 MR. LITCHFIELD: I'm a pie person
7 myself.

8 MR. OLDAKER: We do have some pies.

9 CHAIRMAN LENHARD: No, no. We're not
10 taking pies. We'll have to fly to Florida and buy
11 them ourselves if we want them.

12 Vice Chairman Mason.

13 VICE CHAIRMAN MASON: I can understand
14 the no voter argument. It's a little abstruse;
15 but once you get there, it's fairly clear. Nobody
16 voted; therefore, no opportunity to influence
17 voters.

18 But I would appreciate it if either of
19 you would enunciate the standard short of that
20 that is going to help us distinguish business ads
21 from campaign ads if it's not a clearly identified
22 candidate, which is what's in the regs.

23 MR. OLDAKER: I think that the test, the
24 Chief Justice Roberts set out, is the appropriate
25 test. It is not a test that is as clear as we

1 would all like it to be. You have to both
2 instruct people as to what they can do. And for
3 candidates, we would all like a crystal clear
4 case.

5 I think that what Justice Roberts came
6 out in his statement -- and I can go back and read
7 it, but you've all read it a number of times -- is
8 a standard. It is a standard that is certainly --

9 VICE CHAIRMAN MASON: I understand.

10 MR. OLDAKER: Okay.

11 VICE CHAIRMAN MASON: Let me ask.

12 Unless my memory is fooling me, there was an
13 explicit statement in that opinion that the
14 coordinated communications weren't at issue.

15 MR. OLDAKER: Correct. The coordinated
16 was not at issue.

17 VICE CHAIRMAN MASON: And those
18 regulations are --

19 MR. OLDAKER: I don't even think they
20 were mentioned at any point in there. I'm only
21 suggesting --

22 VICE CHAIRMAN MASON: You're probably
23 aware that those regulations are under litigation
24 in another case.

25 MR. OLDAKER: Correct.

1 VICE CHAIRMAN MASON: I just -- I'm
2 having a hard time when the opinion itself that
3 you're citing says it doesn't apply here, how
4 we're going to leap out there and apply it. So it
5 doesn't apply.

6 MR. OLDAKER: Well, you may not feel
7 comfortable. I'm merely suggesting that I don't
8 know that you have to get there to decide this
9 case. I'm just suggesting, as a matter of course,
10 that this issue should be considered because I
11 think it will come up again.

12 CHAIRMAN LENHARD: Mr. Walther.

13 COMMISSIONER WALTHER: One of the things
14 that concerns me just is the issue of raising the
15 visibility of this gentleman for his business or
16 for his candidacy looked like to me you could
17 argue either one or the other. The business helps
18 the candidacy. The candidacy helps his business.
19 Either way it seems to be a closeness there.

20 But you have a situation where the
21 timing is so close. You form the corporation.
22 You start the business in the middle of June. And
23 I guess it got started a little late. But if it
24 got started on time, it would have been even
25 closer to the May 8th date when he was clearly the

1 unopposed candidate.

2 And in the message that you see in both
3 of these, you see the identical quote. One has a
4 Capitol on the back, and one has Stork's business
5 on the back. But the photograph is the same
6 during the same period.

7 And you're looking at advertising,
8 correct me if I'm wrong on that, but it is the
9 same picture. This picture here and this picture
10 here are the same. One says: South Florida's
11 Best, Stork for Congress. One says: Jim Stork
12 we're voted best bakery.

13 MR. OLDAKER: I don't know that I --

14 MR. LITCHFIELD: Is that in the record
15 in this case? I'm not familiar with what you're
16 looking at. We -- that's not an exhibit that we
17 provided.

18 COMMISSIONER WALTHER: It's part of our
19 records.

20 MS. HEILIZER: It's from the complaint.

21 COMMISSIONER WALTHER: But in any event,
22 the use of the identical photograph, one in one
23 situation and one in the other brings it close to
24 me in terms of what is attempting to be done here.

25 MR. LITCHFIELD: Is he holding a pie or

1 cake in that photo?

2 COMMISSIONER WALTHER: It's just the
3 look of the candidate. The same one he used in
4 his political ads. Identical photo.

5 MR. LITCHFIELD: I'm sorry. I don't
6 know where that comes from. I don't know where
7 that comes from.

8 COMMISSIONER WALTHER: Back here, it
9 says Stork --

10 MR. LITCHFIELD: It's from the
11 complaint.

12 COMMISSIONER WALTHER: Business in the
13 back. And here with the Capitol in the back.
14 Both aspirations at the same time.

15 MR. OLDAKER: Okay. And the question,
16 Commissioner, is if the photo is used in both the
17 campaign ad and a commercial ad, does that impact
18 upon -- would make the campaign ad -- I mean,
19 the --

20 COMMISSIONER WALTHER: I mean, in this
21 particular case, it's a new area for him, so it's
22 important to build a name for both. It's not like
23 he's using a well-established name and likeness of
24 it contained in both with somebody that looks like
25 him.

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1 And the use of the word "best" and
2 "trust" is a candidate qualification. It's not
3 like "most tasty", "most convenient place" or
4 "best price" or new type of, you know, menu. It's
5 really qualities that related to the candidate.

6 So as I look at these factors, and I
7 look at most of your money, most of his money was
8 spent, \$647,000 during the Primary period
9 attempting to obviously raise that visibility for
10 him in general. So when I look at all these, it
11 is a close case for me.

12 MR. OLDAKER: Well, I think you're --
13 let me point out that I think you're right. He
14 viewed this as a General Election only campaign.
15 There was in his mind no Primary. So money he was
16 spending was to influence the General Election
17 against Congressman Shaw. There were only two
18 people contesting.

19 The General Counsel's Office has already
20 dismissed the complaint as it deals with the
21 general election as it would fall outside the
22 90-day timeframe for the General Election.

23 So I think that you're correct,
24 Commissioner, that what he was doing in his
25 efforts as a candidate is -- candidate expenditure

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1 from this committee were clearly to make himself
2 competitive for the General Election.

3 But I don't think he ever in his own
4 mind believed that there was a Primary Election.
5 He knew there wasn't. He knew Florida law. He
6 had been around. He knew that he was in all ways
7 certified for the General Election ballot, as was
8 his opponent, who had a lot -- I must say was a
9 real estate person and had a lot of Shaw signs
10 around selling homes, I mean, because he owned
11 that business.

12 But be that as it may, he -- so he was,
13 you know, looking forward. You can say possibly,
14 possibly -- I wouldn't agree -- that these ads
15 were, because of the picture, were trying to also
16 aid what he was doing in his campaign, his General
17 Election campaign.

18 But your regulation, as it's written,
19 doesn't -- unless that is considered
20 republication, which I don't believe it is, having
21 a picture that -- that dual picture, which I
22 didn't know about until right now, I don't believe
23 would fall under that.

24 And our argument would be that the --
25 that you'd have to look at your General Election

1 regulation to get to that point.

2 CHAIRMAN LENHARD: Mr. Litchfield, did
3 you want to comment?

4 Okay. Vice Chairman Mason.

5 VICE CHAIRMAN MASON: You've -- you've
6 raised a reliance argument. Can you give us any
7 information about what he may have been relying on
8 at the time or whether he had any advice as to the
9 interpretation of the act.

10 For instance, he couldn't have been
11 relying on Wisconsin Right to Life opinion. It
12 doesn't look particularly likely to me that he was
13 relying on this pretty technical, you know,
14 distinction as to the Primary. I don't know. But
15 you've laid that out.

16 And I wonder if you can cite anything in
17 the record that indicates what he was relying on
18 and what the source of that was.

19 MR. OLDAKER: I -- go ahead.

20 MR. LITCHFIELD: At the time that he was
21 running for Congress, our office was assisting him
22 with reporting. We -- Mr. Oldaker was the
23 treasurer of his committee.

24 There were some consultations before the
25 ad ran with our office as to whether it would be a

1 permissible activity. We -- the general program
2 was described to us. The delay in the
3 construction of the new business was explained.
4 And his status as a candidate without opposition
5 in the August 31 was mentioned.

6 Based upon a preliminary review that was
7 done on the fly with consultation with our office,
8 our advice to him was that we did not believe the
9 ad would run afoul given his status in the Primary
10 Election, without voters, without being on the
11 ballot, would run afoul of the regulations. That
12 was, I think, the essence of the reliance. We did
13 not see the text, the actual content of the video
14 until later.

15 MR. OLDAKER: We did not know anything
16 but his name would be in the ad. But his likeness
17 seems not to change our mind.

18 VICE CHAIRMAN MASON: This is fair, and
19 it gets to my point. He consulted.

20 MR. OLDAKER: He did consult.

21 VICE CHAIRMAN MASON: Apparently
22 qualified legal counsel.

23 MR. OLDAKER: Yeah. And we did not -- I
24 mean, one thing we didn't know, quite honestly, is
25 that he would be in the ad itself or that the

1 picture would be there.

2 But the issue of the Stork Bakery
3 advertising was, quite frankly, to him was a more
4 important issue that his business did well than
5 his Congressional race. It was -- that's who he
6 was. That's what his life was about. And that
7 was the likelihood of where he would be because
8 he, you know, was -- any challenger is not given
9 Las Vegas odds that they will be the next
10 incumbent in Congress.

11 So, you know, being a reasonable
12 businessman, he realized he was going to -- you
13 know, that wasn't his necessary desire, but more
14 likely than not, he was going to be a baker after
15 the November election.

16 So he wanted to make sure this was a
17 success. This is where he poured his heart, his
18 money. But -- and it's strange but, as a baker --
19 I don't really understand this -- he's very well
20 known as that. And his business is fairly well
21 known as a place that people want to go. And that
22 was important to him.

23 So to that extent, we thought running an
24 ad for Stork's baking was fine. We don't believe,
25 now that we've seen this ad and seen the handouts,

1 that that changes -- it wasn't the facts
2 necessarily that we knew, but it doesn't change
3 our opinion.

4 CHAIRMAN LENHARD: Okay. Commissioner
5 Weintraub.

6 COMMISSIONER WEINTRAUB: Thank you,
7 Mr. Chairman.

8 I just wanted to follow up on that. So
9 he asked for legal advice. He described it
10 generally. You didn't ask for copies of the ad.
11 You didn't ask for any further information other
12 than his name was going to be mentioned in the ad.

13 MR. OLDAKER: I believe that we did ask
14 for copies. I believe we didn't get them. I
15 believe it was just time and campaign timing --

16 MR. LITCHFIELD: It was a very urgent
17 on-the-fly kind of an inquiry.

18 MR. OLDAKER: It was immediately prior
19 to it happening. He had actually purchased the
20 ads back in April. He had actually paid the
21 advertising -- the creative company and
22 advertising company for them.

23 COMMISSIONER WEINTRAUB: Well, see, now
24 I'm getting a slightly different story here. I've
25 been on the receiving end of a lot of questions

1 like this.

2 MR. OLDAKER: Right.

3 COMMISSIONER WEINTRAUB: So I know how
4 they get asked. And I'm trying to figure out
5 because you're raising basically an advice of
6 counsel defense here, which maybe I overlooked it
7 but I didn't see it in the papers. So this may be
8 a new argument.

9 MR. LITCHFIELD: There was a reference
10 to it in the response we made to the probable
11 cause brief.

12 COMMISSIONER WEINTRAUB: Okay. But now
13 it's beginning to sound like maybe it was
14 qualified. You know, that maybe you said, well,
15 that sounds okay, but we would have to see the ad,
16 which he didn't produce. Yes? No? Maybe?

17 MR. OLDAKER: Well, I think that we
18 indicated we would like to see the ad. But we
19 didn't -- we didn't. The ad was run. The play
20 was followed.

21 COMMISSIONER WEINTRAUB: And presumably
22 there's nothing in writing that would reflect this
23 advice?

24 MR. LITCHFIELD: Telephone. Telephone.

25 COMMISSIONER WEINTRAUB: Okay.

1 CHAIRMAN LENHARD: The -- what is there
2 in the record about the targeting of these
3 communications in terms of where they were
4 targeted? Who did the targeting?

5 MR. LITCHFIELD: He used -- Mr. Stork's
6 business used the Wilson Parsons media firm to
7 make media buys on the cable and to drop the
8 direct mail piece.

9 The cable buys were made in cable zones
10 that included parts of four Congressional
11 Districts, including the 22nd Congressional
12 District where Mr. Stork was running for the
13 General Election.

14 I can't give you precise quantitative
15 breakouts about the extent to which it went into
16 one District or the other. I think that -- I'm
17 not sure that data is even available.

18 But we know that the zone of coverage by
19 the two cable companies that were used included
20 four Congressional Districts. And they did not --
21 and the zones did not include all of the 22nd
22 District. There were portions of the 22nd
23 District that were not included in the cable
24 campaign.

25 As to the direct mail drops, we don't

1 know the ZIP codes that it went to. Presumably we
2 could get that information, but we don't have it,
3 if the Commission thinks that's relevant.

4 CHAIRMAN LENHARD: It's not in the
5 record now?

6 MR. LITCHFIELD: It's not in the record
7 now as to that, no.

8 CHAIRMAN LENHARD: Who made those
9 decisions about the targeting? Were those made by
10 Mr. Stork or by Wilson Parsons or by --

11 MR. LITCHFIELD: I think largely Wilson
12 Parsons. I mean, Mr. Stork, I think, had a staff
13 person in his business that worked with Wilson
14 Parsons in developing this.

15 CHAIRMAN LENHARD: Is this the same
16 company that did his campaign ads?

17 MR. LITCHFIELD: No, it is not. There
18 was a different firm that was used for his
19 campaign ads. Wilson Parsons was only used in his
20 business ads.

21 CHAIRMAN LENHARD: Ms. Duncan.

22 MS. DUNCAN: Thank you. I wanted to
23 come back to, for a moment, the argument that
24 you've made in the brief and here today that has
25 to do with good faith reliance.

1 And as I understand it, you're
2 indicating that respondents acted in good faith
3 reliance or good faith belief that the
4 directed-to-voters language in the regulation did
5 not apply to the advertisements because Mr. Stork
6 was unopposed in the Primary.

7 MR. LITCHFIELD: Yes.

8 MS. DUNCAN: We understand, though, that
9 most of the ads ran within 120 days of the General
10 Election. And of course he wouldn't be running
11 unopposed in the General Election.

12 So to the extent that there was good
13 faith reliance at the time with respect to the
14 Primary, I wonder if you might comment on how the
15 Commission might consider the advertisements that
16 would have been within the regulable period for
17 the General Election as it considers your good
18 faith reliance argument.

19 MR. LITCHFIELD: It was our
20 understanding that the General Counsel's Office is
21 not looking at the period before the General
22 Election since the regulation changed that period
23 to 90 days; whereas, at the time of this conduct,
24 it was 120 days.

25 MS. DUNCAN: That's correct. My focus

1 was more on --

2 MR. LITCHFIELD: The reliance.

3 MS. DUNCAN: -- the reliance argument,
4 yes.

5 MR. LITCHFIELD: Well, based on what we
6 were told in the early consultations, and we -- I
7 think our view was that, just in more general
8 terms, the clear content of the ad campaign was to
9 promote a commercial product and a commercial
10 business and that you wouldn't even be in the
11 playing field of regulating speech that was for an
12 election purpose.

13 CHAIRMAN LENHARD: Vice Chairman Mason.

14 VICE CHAIRMAN MASON: I'm still puzzled.
15 Where does that come from? What part of clearly
16 identified candidate don't you understand?

17 MR. OLDAKER: I think -- well, I'll let
18 Bradley answer that. But I think also we had, at
19 a point of time, we had discussions about 120
20 days. He slipped in time when the ads ran.

21 The issue that we thought was fairly
22 clear is that he was not a candidate in the
23 Primary Election. And we still believe that. And
24 we believe the regulations changed. We didn't
25 reach that issue. It wasn't before the

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1 Commission.

2 Go ahead, Bradley.

3 MR. LITCHFIELD: Where it comes from, I
4 think, Commissioner, goes back to the Commission's
5 statement to the explanation and justification as
6 to what the scope and the reach of the content
7 standard was intended to be; and that is
8 communications whose subject matter is reasonably
9 related to an election.

10 When you look at the subject matter of
11 these ads, we would submit to you that they don't
12 reasonably relate to an election. What they
13 relate to is promoting a cafe and a bakery and the
14 products that are available from Mr. Stork's
15 business establishment.

16 VICE CHAIRMAN MASON: That was trying to
17 explain the categories we laid out. I mean, it is
18 a -- not a supportable reading of the regulation
19 that says clearly identified candidate to say that
20 somehow, when the Commission said clearly
21 identified candidate, we really meant reasonably
22 related to an election.

23 It just doesn't fit with the face --
24 there are a lot of arguments in here I give you
25 credit for. I understand, you know, what may have

1 happened in terms of the delay. I think you've
2 even got an arguable case as to the Primary date.

3 But I'm just mystified as to why clearly
4 identified candidate isn't a discernable standard
5 and why you think somehow that when we said
6 clearly identified candidate we meant something
7 different.

8 MR. LITCHFIELD: Well, clearly
9 identified candidate, I mean, a picture of
10 Mr. Stork, he's clearly identified as Jim Stork.

11 VICE CHAIRMAN MASON: That's right.
12 It's in the regulations.

13 MR. LITCHFIELD: That's right.

14 VICE CHAIRMAN MASON: We have the
15 definition in the regulations. It's been there
16 since when you were here --

17 MR. LITCHFIELD: Sure.

18 VICE CHAIRMAN MASON: -- about what
19 constitutes a clearly identified candidate.

20 MR. LITCHFIELD: I don't -- maybe I
21 didn't speak it the way I intended to. But I did
22 not intend to argue that there was not a clearly
23 identified candidate here. I mean, it's clear he
24 wasn't identified qua a candidate, as a candidate,
25 but he's identified as Jim Stork. And we know

1 from the other facts that he was a candidate.

2 It was the other components of the
3 bright-line test that we were focusing on, the
4 directed to voters in a jurisdiction. I mean it
5 has to -- the standard has to meet that element of
6 the content part.

7 CHAIRMAN LENHARD: I'm going to return
8 to a question which may seem like I'm plowing back
9 over the same ground again. And I do it because
10 we -- I think we're really struggling with this
11 broader question of how do we deal with commercial
12 speech.

13 And there, one of the things that sort
14 of amuses me since I've arrived is there's
15 simultaneously a call from those outside of the
16 building for us to establish nice bright lines
17 and, yet, at the same time, not enforce them as
18 nice clear bright lines sometimes when
19 candidates -- clients appear before us and
20 sometimes even more broadly as we are working
21 forward.

22 And it is a struggle, right, because
23 obviously they both -- both the bright-line
24 rule -- or bright clear rules bright lines. And
25 so a more subtle case-by-case analysis both serve

1 somewhat different, you know; noble and laudable
2 goals.

3 And I guess as I -- as I go back to the
4 argument that we have been looking at speech, we
5 should ensure that -- the commercial speech, that
6 we ensure that we not regulate it to the degree
7 that its purpose is to draw business.

8 How should we interpret a circumstance
9 in which the candidate and business share on their
10 advertising, you know, contemporaneous time
11 periods, the photo of the business
12 owner/candidate, the logo of the
13 business/campaign, and even the typeface that is
14 used in the business and the campaign?

15 At what point do the similarities of the
16 appearance of the advertisement of those two
17 entities, the campaigns and the businesses, both
18 featuring prominently the visual image of the
19 owner/candidate, draw us to believe that a
20 reasonable person would interpret -- and I'll add
21 a factor where the business advertising features
22 describes the character, the qualifications, you
23 know, or fitness to run a business of the business
24 owner, which often business commercial advertising
25 does.

1 You know, car dealerships frequently
2 feature the high quality honesty and truthfulness
3 of the dealership owner. Right? And that's even
4 in a purely commercial context.

5 How do we when we start to see -- what
6 point -- where do we find the line in those kinds
7 of cases? How do we interpret those things as we
8 look at Justice Roberts' test? Does that give us
9 enough clarity? Does that give you enough clarity
10 as to how we interpret those things?

11 And I ask this really out of a truthful
12 search for insight in wrestling with these kinds
13 of problems.

14 MR. OLDAKER: Let me suggest -- and this
15 has been a long time since I've been recommending
16 to the Commission anything. But there are certain
17 things which -- and some of the things that you
18 talk about are very difficult.

19 I think if you look at common vendors,
20 number one, if a candidate is using -- the
21 candidate's business is using the candidate's
22 campaign's vendors to do his business work, I
23 think that is a pollution that you don't want to
24 have. I think, you know, number one, so all of
25 those things have to be kept separate.

1 Then when you get to -- and, you know,
2 in many of the cases that I've seen in the past,
3 that was not so. And I think that that, you
4 know -- and your regulations indicate that that
5 would be violative.

6 I think when you get into the words
7 inside the square box of the ad, you have to only
8 look to those words which would be in any way an
9 attempt -- and, you know, any reasonable person
10 would find that those words were weighted to add
11 some election influence.

12 I don't think that, when you talk about
13 the quality of Volvos -- and I can't remember; Jim
14 Beyer, I guess, was the guy who was, you know, a
15 gubernatorial candidate in Virginia -- when you
16 talk about the quality of Volvos that is
17 necessarily talking about the quality of Jim
18 Beyer.

19 And that's, you know -- but I think, if
20 you have someone coming on and wanting a person
21 and saying that they are, you know, a fantastic
22 person of integrity and honesty and that they do
23 things, that's a different kind of thing.

24 CHAIRMAN LENHARD: So --

25 MR. OLDAKER: So if you're talking about

1 products, I don't think that those words should be
2 taken down as political. Although we use -- you
3 know, words are words. They're only that. You
4 know, they -- they can be weighted in different
5 ways.

6 And I think that, you know, the Chief
7 Justice Roberts' test says that no -- you can make
8 no reasonable determination that it is. Right?
9 So I think that's -- and only looking at the four
10 corners.

11 CHAIRMAN LENHARD: Does that leave us
12 really looking only to see whether there's
13 electioneering speech in the commercial
14 advertising?

15 MR. OLDAKER: Well, it gets difficult if
16 you don't do that in my mind. And, you know,
17 there's never been a constitutional case on this.
18 This has never been tested. My guess is the
19 farther we go, at some time, it will be tested.

20 And it is -- I think it is a -- all of
21 these decisions that you have to make, none are
22 easy. They are all difficult.

23 But the -- you know, the baseline that
24 you always have to look at is there has to be a
25 safe harbor for speech for most things. And I

1 would argue there has to be a safe harbor for
2 commercial speech.

3 I don't know -- I don't know that I
4 could today, sitting here, draw that safe harbor
5 exactly. But we have -- we are a country that
6 encourages everyone to go out and form their own
7 business. And then we can't tell them that they
8 can't be candidates in my mind.

9 And I don't think it matters whether
10 it's republicans or democrats. Both sides rely
11 upon these people.

12 So -- and the words -- all the words you
13 ask, I find each one of them hard to discern
14 where, after further thought, I would come out in
15 all honesty. I find it -- you know, that's what
16 I'm trying to think as I'm talking here. I don't
17 know that I can give you a good answer on any one.
18 They're very difficult questions.

19 CHAIRMAN LENHARD: The attraction of the
20 bright line.

21 Other thoughts or questions? Comments?
22 Commissioner Walther?

23 COMMISSIONER WALTHER: I'm just curious
24 to know what prompted the decision to stop the
25 ads. I see that -- we have some of the ads that

1 came out in the paper, articles about this and the
2 claim, but it thought that this was a scheme to
3 further the campaign. And that, on July 13th, the
4 Federal Election Commission heard the controversy,
5 and a spokesman opined about it's possible to file
6 a complaint when this happened.

7 But it got to that level during the
8 campaign. And then I see that there was some
9 advertisement that continued through, it said,
10 late July and gave us the dates. So I'm wondering
11 what happened in that particular case.

12 MR. LITCHFIELD: The time lines for the
13 commercial campaign for the bakeries were set when
14 it started. I mean, the cable television campaign
15 was set to run for a certain period.

16 And then the direct mail pieces were set
17 to run for a period that's reflected in some of
18 the dates in the ad that I had circulated to you,
19 whether it was a drawing on June 21 for the free
20 lunch which was the opening date of the Las Olas
21 location. And then there was an expiration date
22 of October -- excuse me, August 1 for the free
23 cookie and pastry with the coupon.

24 So the time lines for these were set as
25 part of the commercial plan to promote the

1 business, the new opening of the new business.

2 CHAIRMAN LENHARD: Ms. Duncan.

3 MS. DUNCAN: Yes. Thank you.

4 Well, as you know, the General Counsel's
5 Office's position is that the bright-line test is
6 the appropriate one to apply here. But there's
7 been quite a bit of discussion about the purpose
8 of the advertisements today.

9 And so I just wanted to ask one more
10 factual question, more clarifying question that
11 might be relevant to that inquiry.

12 And that is that a Danielle Webster, we
13 understand that she was both employed -- I'm
14 sorry, Danielle Sylvester. We understand that she
15 was both employed by the bakeries as a marketing
16 consultant to help promote the opening of the new
17 bakery at the same time that she was the campaign
18 manager, albeit temporary, as I understand it, for
19 Mr. Stork's Congressional race at the time.

20 Would you mind commenting on that.

21 MR. LITCHFIELD: I know she had a role
22 in the businesses. I know she had a role in the
23 campaign. I'm not sure about the timing of the
24 two roles. I would want to supplement the record
25 on that for you if that would be permissible. I

1 would appreciate that.

2 CHAIRMAN LENHARD: Okay. You are free
3 to do that.

4 Other comments? Questions? Thoughts?
5 Suggestions?

6 Gentlemen, you've reserved some time for
7 closing. I believe it's 4 minutes at this point.
8 You're free to use that if you would like.

9 MR. OLDAKER: Go ahead if you feel.

10 MR. LITCHFIELD: I think the case comes
11 down to the bright-line test, the element in that
12 test that says directed to voters in a
13 jurisdiction. The time frame that's relevant to
14 this case is the time frame 90 days or what was at
15 the time of the conduct, 120 days before the
16 August 31 Primary Election in Florida in the 22nd
17 Congressional District.

18 There were no candidates on the ballot.
19 There were no voters. There were no votes.
20 Therefore, as to that time frame, which is the
21 only time frame that's presented to us in the
22 General Counsel's brief, there's in violation.

23 CHAIRMAN LENHARD: Very good.

24 MR. OLDAKER: Thank you.

25 CHAIRMAN LENHARD: Thank you, gentlemen.

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1 I want to thank the Staff for helping to prepare
2 this. I want to thank you and your staff for
3 putting this together.

4 Mr. Litchfield.

5 MR. LITCHFIELD: I should have mentioned
6 earlier, with the Commission's permission, we
7 would like to also supplement the record with
8 respect to commenting on the photographs that
9 Commissioner Walther held up earlier that were
10 attached to the complaint.

11 We had focused on the direct mail
12 handouts and the video. We would like to be able
13 to address comments to that point if it would be
14 all right to supplement our brief.

15 MR. OLDAKER: And, actually, I had --
16 Mr. Chairman --

17 CHAIRMAN LENHARD: Any thoughts on that?
18 Commissioner Walter?

19 COMMISSIONER WALTHER: As you do that,
20 would you help us out on giving us information on
21 how the campaign ad went from basically the
22 campaign ad in the tie, the business suit, to the
23 bakery ad. It wasn't the reverse. But, in other
24 words, that ad, that picture was taken --

25 MR. LITCHFIELD: The photographs you're

1 talking about --

2 COMMISSIONER WALTHER: It's on his
3 campaign Web site with a tie and ready to go to
4 Washington. But then it also ended up on the
5 bakery ad. Those facts.

6 MR. LITCHFIELD: Okay. Yes.

7 CHAIRMAN LENHARD: Mr. --

8 MR. OLDAKER: If I might, Mr. Chairman.

9 CHAIRMAN LENHARD: Yes.

10 MR. OLDAKER: There were other issues
11 raised in this probable cause.

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18 CHAIRMAN LENHARD: Okay. My impression
19 is those are all reporting issues?

20 MR. OLDAKER: Correct.

21 MR. LITCHFIELD: Travel advances that he
22 was reimbursed for later and the reporting trail
23 for those transactions, yes.

24 CHAIRMAN LENHARD: I was going to
25 suggest was it 2 weeks -- is 2 weeks enough

1 time -- too much time to supplement the record? A
2 week.

3 MR. LITCHFIELD: I would appreciate it
4 if we could have 3 weeks. There were some
5 vacation plans. We waited 13 months to hear from
6 General Counsel's Office at an earlier stage in
7 this matter. I'm not sure --

8 CHAIRMAN LENHARD: That's because they
9 were working hard on other matters we were
10 pressing them on.

11 MR. LITCHFIELD: I know their docket is
12 full. I was here long enough to know that.

13 CHAIRMAN LENHARD: And the new
14 Commissioners have been especially burdensome to
15 them. They proceeded in good spirits despite that.
16 I'm sure that, if there was delay, it was entirely
17 a product of our doing, not theirs.

18 COMMISSIONER WEINTRAUB: Mr. Chairman, I
19 deny that you were demanding than us old-timers.

20 MR. OLDAKER: And I must say that
21 Mr. Litchfield's baseball many times is as
22 important as the law. So he does play a lot of
23 that.

24 CHAIRMAN LENHARD: The -- so you believe
25 that 2 weeks is -- what's coming in? You're

1 coming in on comments on the shared photos that
2 were mentioned in the complaint as well as that
3 appear in the ads, the later ads. And there was a
4 second point, which I unfortunately --

5 MR. LITCHFIELD: Ms. Sylvester's
6 position in the campaigns.

7 CHAIRMAN LENHARD: Oh, right. Yeah.

8 MR. LITCHFIELD: And the shared photos
9 in the ad.

10 CHAIRMAN LENHARD: Yeah. I mean, it
11 doesn't strike me as a -- are the responsible
12 attorneys going to be out of the office?

13 MR. LITCHFIELD: Well, I think -- yeah.
14 There are some vacation plans afoot. I think
15 3 weeks would do it if you could consider that for
16 us.

17 CHAIRMAN LENHARD: Okay. Okay. We will
18 leave the record -- sorry. Does our Counsel seek
19 recognition on this matter?

20 MS. DUNCAN: Yes. I only wanted to add
21 just as a matter of clarification, in your
22 supplement, if you might address, if the
23 Commission would think this would be helpful, the
24 issue of the logos, the similarity of the logos as
25 well as the photographs.

1 And I was also going to add for the
2 Commission's consideration that our procedures
3 generally contemplate a 10-day period for
4 supplementing the record. But of course you can
5 make any determination that you think is
6 appropriate. I wanted to bring that to your
7 attention.

8 CHAIRMAN LENHARD: Yes. These are new
9 procedures.

10 Is there an objection to extending the
11 time period to supplement the record from the
12 Commissioners?

13 Okay. Gentlemen, you'll have 3 weeks in
14 which the record will remain open for you to
15 submit additional information.

16 Any other matters in this? Okay. Very
17 good. I will bring this hearing to a close then.
18 Thank you very much.

19 (Whereupon, at 11:14 a.m., this
20 executive session of the Federal Election
21 Commission was concluded.)

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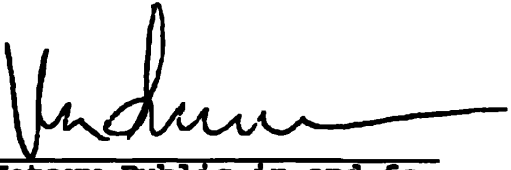
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1 CERTIFICATE OF NOTARY PUBLIC

2 I, Vicky Stallsworth Reinen, the officer
3 before whom the foregoing executive session was
4 taken, do hereby certify that the executive
5 session was taken in shorthand and thereafter
6 reduced to typewriting by me or under my
7 direction; that said transcript is a true record
8 of the proceedings.

9 I further certify that I am not of counsel to
10 any of the parties, nor an employee of counsel,
11 nor related to any of the parties, not in any way
12 interested in the outcome of this action.

13
14 As witness my hand and notarial seal this
15 18th day of July, 2007.

16
17
18 
19 Notary Public in and for
20 the District of Columbia

21 My Commission expires:

22 August 14, 2007

23

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